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207.65A SECOND-DEGREE FORCIBLE SEXUAL OFFENSE—ALLEGED VICTIM HAS A MENTAL DISABILITY, IS MENTALLY INCAPACITATED OR PHYSICALLY HELPLESS. (OFFENSES ON OR AFTER DEC. 1, 2015) FELONY.

*NOTE WELL: The crime of Sexual Offense covers sexual acts other than vaginal intercourse and applies regardless of the gender of the defendant or the alleged victim.*

*This instruction is valid for offenses committed on or after December 1, 2015. For offenses committed before December 1, 2015, use N.C.P.I.—Crim. 207.65.*

*NOTE WELL: For offenses committed on or after December 1, 2019, N.C.G.S. § 14-27.20(2) defines "mentally incapacitated" as a victim who due to* ***any act*** *is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act. For the period between December 1, 2018 and December 1, 2019,"mentally incapacitated" is defined as a victim who due* ***to (i) any act committed upon the victim or (ii) a poisonous or controlled substance provided to the victim without the knowledge or consent of the victim*** *is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or sexual act.*

The defendant has been charged with second-degree forcible sexual offense.

For you to find the defendant guilty of this offense, the state must prove three things beyond a reasonable doubt:

First, that the defendant engaged in a sexual act with the alleged victim. A sexual act means

(a) [cunnilingus, which is any touching, however slight, by the lips or the tongue of one person to any part of the female sex organ of another.][1]

(b) [fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another.][2]

(c) [analingus, which is any contact between the mouth or lips of one person and the anus of another.]

(d) [anal intercourse, which is any penetration, however slight, of the anus of any person by the male sexual organ of another.]

(e) [any penetration, however slight, by an object into the [genital] [anal] opening of a person's body.]

*NOTE WELL*: *N.C. Gen. Stat. § 14-27.1(4) provides that it shall be an affirmative defense to the fifth type of sexual act in (E) above that the penetration was for an accepted medical purpose. If there is evidence of such a purpose, instruct accordingly at the end of the charge and in the mandate. See N.C.P.I.—Crim. 306.10 for an instruction on Accepted Medical Purpose*.

Second, that the alleged victim

(a) [had a mental disability. A person has a mental disability if the person suffers from [an intellectual disability] [a mental disorder] and this [intellectual disability] [mental disorder] temporarily or permanently renders the person substantially incapable of

(1) [appraising the nature of the person's conduct]

(2) [resisting a sexual act]

(3) [communicating unwillingness to submit to a sexual act.]]

*NOTE WELL: With regard to element (b) below, for offenses committed on or after December 1, 2018 and before December 1, 2019, delete "any act" and substitute the following language: [any act committed upon the person] [a poisonous[3] or controlled substance provided to the person without their knowledge or consent]*.

(b) [was mentally incapacitated. A person is mentally incapacitated when, due to any act, the person is rendered substantially incapable of [appraising the nature of the person's conduct] [resisting the act of vaginal intercourse] [resisting a sexual act]].

(c) [was physically helpless. A person is physically helpless if that person is

(1) [unconscious]

(2) [physically unable to resist a sexual act]

(3) [physically unable to communicate unwillingness to submit to a sexual act].]

And Third, that the defendant knew or should reasonably have known that the alleged victim [had a mental disability] [was mentally incapacitated] [was physically helpless.]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in a sexual act with the alleged victim and that at that time the alleged victim [had a mental disability] [was mentally incapacitated] [was physically helpless] and that the defendant knew or should reasonably have known that the alleged victim [had a mental disability] [was mentally incapacitated] [was physically helpless], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt about one or more of these things, it would be your duty to return a verdict of not guilty.

*NOTE WELL: In an appropriate case the judge should use N.C.P.I.—Crim. 201.10 to charge on attempted second degree sexual offense as a lesser included offense under this charge*

*NOTE WELL: If a party requests an instruction on Assault on a Female, see State v. Martin, 222 N.C. App. 213 (2012), where the*

*defendant was convicted of two counts of first-degree sexual offense, the North Carolina Court of Appeals held that assault on a female is not a lesser included offense of first-degree sexual offense, because to convict for first-degree sexual offense, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least 18 years of age.*

*Simple Assault may still be an appropriate lesser included offense. If so, use N.C.P.I.—Crim. 208.40.*

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1. In *S v. Ludlum*, 303 N.C. 666 (1981), the North Carolina Supreme Court held that penetration of the female sex organ is not required to complete the act of cunnilingus under the Sexual Offense Statutes set out in N.C. Gen. Stat. § 14-27.4 *et seq*. However, the Court did specifically adhere to the rule of earlier cases that penetration is required to complete the offense of Crime Against Nature. (N.C. Gen. Stat. § 14-177; N.C.P.I.—Crim. 226.10.)

2. *S v. Warren*, 309 N.C. 224 (1983), held that Crime Against Nature is not a lesser included offense of first- or second-degree sexual offense, but when the bill of indictment charges anal intercourse *Warren* infers that Crime Against Nature is a lesser included offense.

3. If the substance used to cause incapacitation of the alleged victim was unusual or not commonly known or thought to be poisonous, use the following statement: "It is not necessary that a substance be widely known as a poison for the purposes of this crime; just as arsenic and cyanide are poisonous substances which will cause death to a human being, so also is sugar to the acute diabetic, or dust to the acute asthmatic. In determining the poisonous nature of a substance, you must look to the peculiar weakness or sensibility of the victim to that particular substance." *See* N.C.P.I.—Crim. 206.12.